(23)

HIGH COURT OF CHHATTISGARTH, BILASPUR

Criminal Appeal No.985 /2001

APPELLANT Enesh Giri, s/o Gajendra Goswami, aged about 20 years, r/o Sitamani Korba, Distt. Korba (C.G)

Versus

RESPONDENT State of Chhattisgarh, through the District Magistrate, Korba, Distt. Korba (C.G).

Criminal Appeal No.1019 /2001

APPELLANT Manoj Son of Ashok Kumar Gupta, aged about 19 years, r/o Sitamani Korba, Distt. Korba (C.G)

Versus

RESPONDENT State of Chhattisgarh, through the S.H.O., Korba, Distt. Korba (C.G).

Criminal Appeal No.1033 /2001

APPELLANT Chhotu @ Shushil Kumar, s/o Rameshwar Gupta, aged about 18 years, r/o Sitamani, Korba, Distt. Korba

Versus

RESPONDENT State of Chhattisgarh, through the District Magistrate, Korba (C.G).

Appearance:

Shri R.P. Tripathi with Shri Sunil Sahu, counsel for the appellant Enesh Giri.
Shri Sharat Tiwari, Advocate, appears on behalf of Shri Ram Kumar Tiwari, counsel for the appellant Manoj.
Shri H.S. Patel, counsel for the Appellant Chhotu @ Sushil.
Shri Ravindra Agrawal, Panel Lawyer appears for the State

Criminal Appeal No.12/2002

APPELLANT The State of Chhattisgarh,

Versus

RESPONDENTS

1. Chhotu alias Sushil Kumar, aged about 18 years, s/o Rameshwar Gupta, r/o Sitamani, Korba (C.G).
2. Manoj, aged about 19 years, s/o Ashok Kumar Gupta, r/o Sitamani, Korba, (C.G).
3. Inesh Giri, aged about 20 years, s/o Gajendra Goswami, r/o Sitamani, Korba (C.G)

Appearance:

Shri Ravindra Agrawal, Panel Lawyer appears for the State
Shri H.S. Patel, counsel for the accused respondent No.1 Chhotu @ Sushil.
Shri Sharat Tiwari, Advocate, appears on behalf of Shri Ram Kumar Tiwari, counsel for the accused/respondent no.2 Manoj.
Shri R.P. Tripathi with Shri Sunil Sahu, counsel for the Accused/respondent No.3 Enesh Giri

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CRIMINAL APPEALS u/s 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

D.B.: HON'BLE SHRI L.C BHADOO,
HON'BLE SHRI SUNIL KUMAR SINHA, J, J

ORAL JUDGMENT
(05.11.2007)

The following judgment of the Court was passed by
L.C.Bhadoo, J,

(1). Criminal Appeal No.985/2001 filed by appellant Enesh Giri, Criminal Appeal No.1019/2001 filed by Manoj, Criminal Appeal No. 1033/2001 filed by Chhotu @ Sushil Kumar and Criminal Appeal No.12/2002 filed by the State of Chhattisgarh are arising out of the same judgment dated 06.10.2001 passed by the Ist Addl. Sessions Judge, Korba, in Sessions Trial No.163/2001, therefore, they are being disposed of by this common judgment. By these

(24)

appeals, the accused appellants have questioned the legality and correctness of the said judgment of conviction and order of sentence whereby the learned Addl. Sessions Judge, after holding the accused appellants guilty for commission of the offence punishable under sections 450, 376(2)(g) & 302 read with section 34 of I.P.C., sentenced each of the accused appellant to undergo 7 years R.I., to pay a fine of Rs.500/-; 10 years R.I. , to pay a fine of Rs.500/- & imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine amounts to further undergo two months S.I. on each count. It was directed that all the substantive sentences shall run concurrently. On the other hand, being aggrieved by the quantum of sentences awarded by the trial Court the State has also preferred appeal seeking enhancement of the sentence of the accused appellants.

(2) The case of the prosecution in brief is that on 23.1.2001 at about 2.15 p.m., the accused persons had eve-teased Miss Gayatri, aged about 14 years with a bad intention. When Champa Bai was sleeping in her house, accused Chhotu @ Sushil Kumar came to her house and attempted to outrage the modesty of Gayatri but Champa Bai woke up and she informed Kadam Singh Thakur, who in turn scolded accused Chhotu @ Sushil. At about 4.30 p.m., on account of some paiN in her stomach, Champa Bai alongwith her two small children went to answer the call of nature. She left Gayatri there because she was sleeping at that time. When she was at the river, Hamiddun Begum came and informed that Gayatri is burnt at the residence, therefore, she returned to her house. By that time, Gayatri was already taken to hundred bedded hospital. At about 6 p.m. she reached hospital and she saw Gayatri in a burnt condition. On enquiry by her, Gayatri made oral dying declaration that Chhotu @ Sushil alongwith his two friends tied her with cot and after pouring petrol on her body, set her on fire. At about 2 a.m., in the night, Gayatri breathed her last on account of burn injuries. The information was sent by the Doctor regarding death of Gayatri Bai on the basis of which, merg intimation Ex.P.9 was recorded by the Head Constable Hetram, Chowki Rampur, P.S. City Kotwali. Champa Bai also gave intimation to P.W.12 Akhil Pandey, Head Constable, Outpost

Rampur, based on that he had recorded Ex.P.13 and the same was sent to the Police Station Kotwali, on the basis of which the F.I.R. Ex.P.16, was registered for commission of the offence u/s 302 read with section 34 & 450 of the I.P.C. The dying declaration of Gayatri was recorded by the Executive Magistrate A.K. Agrawal (P.W.8) in hundred bedded hospital. The inquest Ex.P.4 was prepared on the body of Gayatri. One underwear of accused Enesh was seized under Ex.P.1. Bermuda of accused Chhotu @ Sushil was seized under Ex.P.2. One burnt wooden cot, the remains of burnt clothes and plastic *Nawar* and one piece of rope was seized under Ex.P.3. On the body of Gayatri, the post mortem was conducted by Dr.Smt. N. D. Ram (P.W.9) and Dr.A.V. Purena (P.W.19) who opined that the cause of death was shock due to 100% burns and it was homicidal in nature. They prepared postmortem report Ex.P.8. Dr.Smt.N.D.Ram also examined the body of Gayatri regarding commission of rape and she prepared medical examination report Ex.P.7. When Gayatri was admitted in 100 bedded hospital, the Doctor examined her, prepared medical examination report Ex.P.19 and it was shown that she was conscious at that time.

(3) After completion of investigation, the charge sheet was filed against the accused appellants in the Court of C.J.M. Korba, who in turn committed the case to the Court of Sessions, Bilaspur, from where the learned Additional Sessions Judge, Korba received the case on transfer.

(4) The prosecution in order to establish the charges against the accused persons examined as many as 20 witnesses. The statement of the accused persons were recorded u/s 313 Cr.P.C., in which each of the accused denied the material appearing against him and stated that they are innocent and have been falsely implicated in this case.

(5) The learned trial Court after hearing counsel for the respective parties convicted and sentenced each of the accused as aforementioned.

(6) At the very outset, learned counsel for the accused appellants have not disputed the homicidal death of Gayatri. More

(25)

over, P.W.1 Rafeeq has stated that his grand daughter Sanno informed that Gayatri was burnt, therefore, he went to that side and saw that Gayatri was lying burnt and his sons Nayim and Bhalla were extinguishing the fire, thereafter his elder son Salim reached there, accused Enesh was also present there and they took Gayitri to Hospital. Similar is the evidence of P.W.2 Nayim Khan who has stated he saw Gayatri while she was burning and she was crying save, save and there after she fell down. He extinguished the fire by covering her body with a blanket and thereafter poured water also. P.W.3 Aslam @ Balla has also corroborated the above evidence about the burning of Gayatri. The above ocular evidence is corroborated by Dr.(Smt.) N.D. Ram as also Dr.A.D.Purena (P.W.19) who conducted the postmortem on the body of Gayatri and they have stated that death of Gayatri was on account of burn injuries and the death was homicidal in nature. The post mortem report is Ex.P.8. Therefore, from the above ocular and medical evidence it is established that death of Gayatri was homicidal in nature.

(7) As far as the complicity of accused persons in crime in question is concerned, in this case, there is no ocular or direct evidence regarding the involvement of the accused persons in the crime. The whole case rests on the circumstantial evidence and as per the settled law, in order to rest conviction of an accused based on the circumstantial evidence, the prosecution is required to establish the following points in view of the decision of the Apex Court rendered in the matter ***Dhananjoy Chatterjee –Vs- State of W.B. reported in (1994) 2 SCC 222***, which is quoted below:

> "in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for

the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

(8) In the present case, the prosecution has tried to establish the crime against the accused persons based on oral dying declaration made by Gayatri before P.W.2 Nayim Khan, P.W.3 Aslam @ Balla, P.W.5 Mohmmad Safi @ Mundal, P.W.16 Itwari Das, father of the deceased, P.W.18 Champa Bai, mother [redacted] deceased.

(9) Having heard learned counsel for the parties, we have perused the material available on record as also the judgment of the trial Court.

(10) It is settled law that in order to rest conviction based on the oral dying declaration, it is the duty of the court to ensure that the dying declaration was voluntary, true and prompt and where the Court finds that the oral dying declaration is shaky and no explicit reliance can be placed on the same, then must see that the dying declaration is corroborated in material particulars by other evidence.

(11) In the matter of T***hurukanni Pompiah and another –vs- State of Mysore, AIR 1965 S.C. 939*** the Apex Court held that a dying declaration is relevant and material evidence in the prosecution of the assailants and a truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused, who had no opportunity to test its veracity by cross examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court

(26)

may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration.

(12) In the matter of ***State of Punjab –vs- Praveen Kumar, (2005) 9 SCC 769*** the Apex Court held that where dying declarations being inconsistent with each other as versions disclosed in the two were quite different and role of the accused was differently described, those were also not reliable.

(13) In the light of the above principles, if we scrutinize the material available on the record, it is admitted position that in the first instance at the request of the I.O., P.W.8 A.K. Agrawal, the Executive Magistrate cum Tahsildar, Korba, recorded the dying declaration Ex.P.6 in the hundred bedded hospital, Korba at 6.45 p.m., in which Gayatri made a dying declaration that she was sleeping in her house, she was burning therefore, she woke up she ran out of the house and raised cries, at that time nobody was at her house, her mother had gone to River. She does not know that how she came in contact with fire. There was no dispute in her house with her parents nor there was any dispute in the vicinity. She has said that some one might have set her on fire. She does not know who set her on fire. Her parents or any other family members have not set her on fire.

(14) The Executive Magistrate A.K. Agrawal (P.W.8) has stated that on 21.3.2001 at about 6.45 p.m., he recorded the dying declaration of Gayatri. She stated that she was sleeping in the house when she was burning, she woke up and came out of the house and raised cries. The Magistrate has reproduced the oral dying declaration (Ex.P.6) given by the deceased and he has categorically stated that when he recorded the dying declaration of the Gayatri, he enquired from her as to who set her on fire, but she did not disclose the name of any one even on asking from her many times. Therefore, as per the evidence of Executive Magistrate P.W.8 A.K. Agrawal and the dying declaration Ex.P.6 recorded by him, it clearly shows that Gayatri was not able to tell as to who set her on fire. Now the question remains about the oral dying declaration made before 5 witnesses. P.W.2 Nayim Khan has

stated that on the fateful day he saw Gayatri in burning condition. She was crying and after waking 2-4 steps she fell down he covered her body with bag, thereafter with a blanket and also poured water on her body. On asking from her, she was taking the name of Chhotu in the meantime, 50-100 persons gathered there and from there they took her to Dharam Hospital, Korba. As no body was there, they took her to Police Station where *Daroga* recorded her statement and thereafter, she was taken to hundred bedded hospital. On enquiry by the Doctor, she disclosed the name of Chhotu and after about half an hour the Tahsildar came and recorded her statement. She disclosed the name of Chhotu and two others before the Tahsildar and said that she does not know the name of other two persons. In the cross examination, he has stated that when he alongwith his father enquired from Gayatri she disclosed the name of Chhotu and she did not disclose the name of anybody else, thereafter they took her to the hospital. In para 9 he has stated that it is correct that at the place of incident, she did not disclose that Chhotu @ Sushil Gupta and & others set her on fire after tying on the cot and pouring petrol on her body. How this fact has been written in her police case diary statement Ex.D-1, he does not know. His father Rafeeq has been examined as P.W.1 who in para 2 of his evidence has categorically stated that he did not enquire anything about burning from Gayatri. Of course, later on he came to know that Chhotu @ Sushil and two other persons have set her on fire. He heard like that. He does not know any thing more. Therefore, the evidence of P.W.1 Rafeeq and his son P.W.2 Nayim Khan is contradictory to each other for the reason that P.W.2 Nayim Khan has stated that his father also reached to the spot, in his presence only he enquired from Gayatri, she took the name of Chhotu and this witness has not stated about two other persons who came alongwith Chhotu to set her on fire. On the contrary, Rafeeq has stated that nothing was enquired from Gayatri as to how she received the burn injuries.

(15) Another witness is P.W.3 Aslam @ Ballu. He has also stated that hearing the cries, he went near the house of Gayatri and saw that she was burning. On enquiry she disclosed the name of Sushil and stated that two other persons have also set her on fire.

(27)

In the cross examination, he has stated that he did not see anybody setting Gayatri on fire. He has stated that his police case diary statement was not recorded, in the last line of para 5 he has stated that whatever he has stated has stated merely on the basis of his hearing from others. Therefore his evidence is based on hearsay. His police case diary statement was not recorded. Therefore, this witness is not of any help to the prosecution to establish that the deceased made oral dying declaration before him regarding setting Gayatri on fire by the accused persons. P.W.5 Mohd. Safi @ Mundul in para 5 of his statement has stated that Chhotu, brother of Anil set her on fire and she further stated that 3 per sons came together but in para 14 of his cross examination, he has contradicted the police case diary statement Ex.D-2. A perusal of the police case diary statement Ex.D-2 shows that this fact that Gayatri made oral dying declaration regarding setting her on fire by Chhotu. 3 persons came does not find place in this police case diary statement, therefore, this is an improvement before the Court and the same cannot be relied on. Regarding the fact that the accused persons said that *Poddar* is their person and they have bribed the police, they are not going to take any action against him but this fact also does not find place in police case diary statement Ex.D-2, as such no reliance can be placed on the evidence of this witness.

(16) P.W.16 Itwari Das, father of the Gayatri Devi has stated in his examination in chief that in the hospital her daughter disclosed that Chhotu @ Sushil, Manoj & Enesh came and set her on fire but in the case diary statement Ex.D-7 such statement is not there. More over, he has also stated that when he came there, the Tahsildar was recording the statement of his daughter. A perusal of the police case diary statement Ex.D-7 reveals that he has stated that when he came his wife Champa Bai disclosed that these 3 persons have set Gayatri on fire, therefore, it is not established that Gayatri made oral dying declaration regarding involvement of the appellants in crime in question before this witness.

(17) Now we are left with P.W.18 Champa Bai, the mother deceased before whom Gayatri said to have made oral dying

declaration. In examination in chief, she has stated that she enquired from Gayatri then she disclosed that Chhotu, Enesh, Manoj after committing rape on her, tied her, poured petrol on her body and set her on fire. This witness has also stated that her daughter's statement was recorded by the Tahsildar in the presence of Doctor and to them also, she disclosed that fact but as has been mentioned earlier, P.W.8 A.K. Agrawal has categorically stated that Gayatri gave dying declaration Ex.6 and in that, Gayatri stated that she does not know who set her on fire, therefore, recording of dying declaration by Tahsildar is admitted by the prosecution witnesses and the Tahsildar has categorically recorded the dying declaration Ex.P.6 given by Gayatri in which Gayatri has categorically stated that she does not know who se her on fire. More over P.W.18 Champa Bai in her police case diary statement Ex.D-8 has stated that Gayatri disclosed that Chhotu and two others set her on fire, she has not categorically taken the names of accused Enesh and Manoj and in Ex.D-8 she has not stated that Gayatri told her that the accused persons committed rape on her before setting her on fire. Therefore, there is an improvement of names of Manoj and Enesh in Court evidence and the mother and father both have categorically admitted that the oral dying declaration was recorded by the Tahsildar, in which Gayatri has not taken the name of any person nor regarding the commission of the rape by any one on Gayatri, has b[redacted] mentioned in the dying declaration. Therefore, there is a material contradiction in the evidence of prosecution witnesses before whom Gayatri stated to have made oral dying declaration and that too all these statements are contradictory to the written dying declaration made by Gayatri before the Tahsildar. Merely on the basis of evidence of P.W.18 Champa Bai before whom the oral dying declaration said to have been made does not inspire confidence of the court because in the first instance the oral dying declaration is inconsistent with the dying declaration Ex.P.6 made before the Executive Magistrate. Even the evidence of P.W.1, P.W.2 & P.W.18 with regard to oral dying declaration in respect of the accused persons is contradictory and inconsistent. Even other wise, there are other inherent infirmities in the investigation for the reason that P.W.12 Akhil Pandey has stated in para 3 of his

(28)

evidence that on 24.1.2001 on the basis of the statement of the mother of deceased, he registered the case whereas there is no such statement of mother Champa Bai is available on record. In para 4 again he has stated that it is correct that the statement of Champa Bai, mother of deceased recorded by him was the basis of the first information report but that statement is not included in the file. When that was the basis of recording of the F.I.R. and that has not been placed on record by the prosecution that shows the material documents have been suppressed. Therefore, in view of the foregoing discussion, there is inconsistency between the evidence of the prosecution witnesses regarding the names of accused taken by Gayatri in her oral dying declaration. Moreover, the evidence of Champa Bai P.W.18 regarding the oral dying declaration made by Gayatri before her is not corroborated by any other independent circumstantial evidence on account of infirmities in the evidence of prosecution witnesses. The prosecution has not been able to establish the involvement of the accused appellants in the crime in question beyond reasonable doubt. As such the finding of the trial court convicting the accused persons for commission of the offence u/s 450, 376(2)(g) & 302 read with section 34 of I.P.C. cannot be sustained. The conviction and sentence imposed against the accused appellants are set aside.

(18) In the result, the appeals filed by accused appellant Enesh Giri, Chotu @ Shshil and Manoj succeeds. They are allowed and the accused persons are acquitted of all the charges. The accused persons are stated to be in detention since 25.1.2001, therefore, they be set on liberty forthwith, if not required in any other case.

(19) Consequently, the State appeal being devoid of merit is dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

/Rao/